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Supreme Court, U.S.
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No. 00-1329

In The

Supreme Court of the United States

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION 46,

Petitioner,

v.

TRIG ELECTRIC CONSTRUCTION CO., A WASHINGTON CORPORATION; LYDIG CONSTRUCTION, INC.; FIDELITY AND DEPOSIT COMPANY OF MARYLAND; and DEPARTMENT OF GENERAL ADMINISTRATION,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Washington

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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33 pp

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, there is no parent corporation of Respondent Lydig Construction, Inc. and no publicly held corporation owning any of its stock. Respondent Fidelity & Deposit Company of Maryland is wholly owned by Zurich North America Insurance, Inc.

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REASONS FOR DENYING THE WRIT

Petitioner asserts the opinion of the Washington Supreme Court is part of a "nationwide proliferation of litigation over the question presented" and this Court's attention is warranted to resolve an alleged conflict in authority. Pet. at 13. Petitioner also contends this Court must step in to rectify alleged "disparate treatment" resulting from the application of ERISA as enacted by Congress. Pet. at 14. On at least three grounds, the petition should be denied.

First, Petitioner ignores a fundamental jurisdictional bar to review on the merits – its own lack of standing. While the Washington Supreme Court elected to bypass this critical threshold issue in its decision on the merits, the "case" or "controversy" requirement of Article III to the Constitution cannot be satisfied in this case. The standing impediment alone bars review.

Second, the alleged conflict within the "nationwide proliferation" of litigation alluded to by Petitioner is a fiction built on clearly distinguishable cases. Looking at analogous cases leads to the conclusion that the case law is stable and consistent. The courts before and after *New York State Conference of Blue Cross and Blue Shield Plans v. Travelers Ins. Co.*, 510 U.S. 645 (1995) have soundly and consistently held that when state bond statutes augment the exclusive remedies created by Congress and thereby create a wholly new class of obligors required to pay enhanced federal pension liabilities, they are preempted. There is simply no "compelling" need for this Court to step in at this time. Supreme Court Rule 10.

Third, Petitioner's naked invitation to have this Court exercise legislative judgment to rectify a perceived "disparate" treatment caused by the remedial scheme enacted by Congress under ERISA simply proves that Petitioner's complaint is more appropriately directed to Congress.

I.

PETITIONER LACKS STANDING

Petitioner in this case is not the electrical subcontractor hired by general contractor Respondent Lydig Construction, not any of the employees who worked for that subcontractor, and not the trust fund that allegedly failed to receive fringe benefit payments from the subcontractor under the terms of the collective bargaining agreement alleged in the complaint.

Petitioner is instead the collective bargaining representative of the employees, which alleges in its complaint that the electrical subcontractor did not pay fringe benefit contributions *to the trust funds*. There is no evidence the trust funds authorized this plaintiff to sue on their behalf or that Petitioner sustained any injury in fact because of the alleged underpayments. Nor is there any evidence that employees suffered any harm since it is admitted that the trust funds would have had to make up any alleged shortfall in delinquent contributions. Pet. at 12, n. 4.

Petitioner filed a lien notice on March 24, 1998 for approximately $45,000 and an amended lien notice on July 22, 1998 in a slightly revised amount, both of which were made in the name of "the undersigned Local 46

IBEW (Union)." App. at 1, 6. Not once has Petitioner alleged or proven it is acting on behalf of any trust fund. Petitioner brought this action in its name, purporting to have standing under the public works statutes of the State of Washington to foreclose liens against the surety bond.[1]

Respondents moved for summary judgment on July 9, 1999, arguing first and foremost that Petitioner lacked standing to sue as an association under the holding of *Ironworkers District Council of the Pacific Northwest v. Board of Regents*, 93 Wn. App. 735, 970 P.2d 351 (1999) ("*Ironworkers*") (labor organization does not provide labor to the project, and is therefore not a legally recognized claimant under the bond lien statute). The trial court assigned to this matter, The Honorable R. Joseph Wesley of the King County Superior Court, had coincidentally ruled in favor of another general contractor on this same standing issue in a similar case only three months before Respondents brought their motion in this case.[2] App. at 3-5.

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[1] As required by RCW 39.08, Respondent Lydig Construction acquired a payment bond from Respondent Fidelity and Deposit Company of Maryland as surety. A surety bond is not insurance, since the principal (Lydig) is required to reimburse the surety for any claims or losses incurred. *Honey v. Davis*, 131 Wn. 2d 212, 930 P.2d 908 (1997).

[2] That prior case was referred to below as the *Sollitt* case, for the general contractor involved in *Ironworkers District Council of the Pacific Northwest v. University of Washington, et al.*, King County Cause No. 98-2-03821-7 SEA. The general contractor in *Sollitt* had brought its motion based on *Ironworkers* and the trial court agreed that plaintiff's complaint in *Sollitt* would have to be dismissed under the authority of that case. At the hearing on the defense motion in *Sollitt*, the plaintiff union

In the alternative, Respondents moved to dismiss the action on the basis of ERISA preemption. Respondents noted that while the nominal plaintiff in this action was a labor organization, the real party in interest appeared to be the trust fund to whom petitioner would presumably channel any monetary recovery achieved in this litigation. On that ground, Respondents contended that merely packaging a trust fund claim under the guise of a claim by Petitioner labor council as named plaintiff changes nothing in the substance of the claim and that to allow Petitioner to prosecute a claim that is otherwise preempted by ERISA merely because the suit is not brought in the name of the ERISA trust fund would exalt form over substance.

In opposition to Respondents' motion, Petitioner attempted to establish its standing to sue by citing to various "assignments" of claims executed *not* by the trust funds in favor of Petitioner but instead by certain employees of the defaulting subcontractor, Trig Electric Construction Company. Petitioner had not previously invoked any assignments to establish standing to sue in this case. The lien notices and the complaint are devoid of any mention of assignments. The efficacy of such assignments, where the employees received benefit credits regardless of the employer's payment or not, was doubtful at best. Also problematic was the fact, pointed out by

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council moved orally to amend its complaint to allege its standing as an "assignee" of certain individual members who worked on the project. The trial court rejected this argument on various grounds including the fact that "at the time the lien was filed, the party claiming the lien, the council, had no assignments." App. at 4.

Respondents to the King County Superior Court, that all of the purported assignments of claims were executed by employees long *after* Petitioner filed its first and amended lien notices in March and July of 1998, respectively. Since assignments can only be effective when made, and Petitioner had no assignments in hand when either of the lien notices were recorded, the original or amended liens were void and Petitioner had no standing to sue to foreclose them just as in the *Sollitt* case (*see* fn.2).

In response to this argument, Petitioner advanced a novel "relation back" theory, contending the assignments (executed in November and December of 1998 and July of 1999) "related back" to the first and amended lien notices in March and July of 1998 and therefore cured the obvious lack of authority to lien and standing to sue that would otherwise exist under the *Ironworkers* case. Respondents in turn argued that Petitioner's "relation back" doctrine was without precedent under Washington law (to this day, Petitioner has still not offered any such precedent) and was bad policy since the predictability and certainty required of the public lien notice system would be eviscerated if, without notice to potentially liable parties, a defective lien notice could be unilaterally amended by the undisclosed activity of another (*i.e.*, securing assignments from the alleged parties in interest). Respondents contended that Washington's lien statutes look to the notice itself as the exclusive determinant of the claimant's rights to payment since the lien notice, as a publicly filed document (RCW 39.08.030) must be relied upon by the world at large.

The King County Superior Court entered an order dismissing the action on August 6, 1999. Pet. at 23a. On

direct review by the Washington Supreme Court, all parties vigorously briefed the standing issue. In affirming the judgment, the Washington Supreme Court declined to decide the standing issue. Pet. at 4a, n.1 ("The standing issue is not essential to our holding. We therefore pass to the ERISA preemption question.") Petitioner now asks this Court to take review without so much as mentioning this fundamental jurisdictional bar or its extensive history in the proceedings below.

To satisfy the "case" or "controversy" under Article III of the Constitution, Petitioner must establish the "irreducible constitutional minimum" of standing. *Bennett v. Spear*, 520 U.S. 154, 162 (1997); *Diamond v. Charles*, 476 U.S. 54, 61-62 (1986) (dismissing appeal for want of subject matter jurisdiction). While Article III standing is a question of federal law,[3] the holding in *Ironworkers* correctly turned on well-established federal law doctrines on the standing of an association to sue on behalf of its members. *Ironworkers*, 93 Wn. App. at 741, n.14, 970 P.2d at 354, n.14 (citing *Warth v. Seldin*, 422 U.S. 490 (1975). The particular standing issue here is imbued with novel and untested issues concerning the requirements under Washington state law for perfecting a valid claim under Washington's lien statute.[4]

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[3] *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 804 (1985).

[4] While in *dicta Ironworkers* suggested that assignments could provide standing in an appropriate case, the King County Superior Court found the assignments in this case failed because they do not "relate back" to cure the obvious infirmity in the public lien notice. As noted above, they also were not executed by the trusts as the real parties in interest.

Petitioner's lack of standing obviates the petition. The assignments were not provided by the allegedly injured party (the trust). As Petitioner concedes, the employees suffered no harm because the trusts were required to provide benefit credits regardless of payment by the subcontractor employer. Pet. at 12, n.4. Second, even if assignments from employees were to be considered, they have no effect under the particular circumstances of this case because Petitioner's "relation back" twist on standing is without precedent and is contrary to the whole public scheme of Washington's lien statute. At a minimum, it would be anomalous for the Supreme Court to reach out and take review of this case where the Washington Supreme Court expressly declined to address, much less endorse, Petitioner's ambitious standing theory under state lien law. This matter is not an appropriate case or controversy for resolution of the issue presented.

II.

THERE IS NO "NATIONWIDE PROLIFERATION" OF CASES

Petitioner tactically dramatizes the split of opinion *among* the nine Justices of the Washington Supreme Court (Pet. at 5-10) to mask the lack of any square conflict in authority *between* pertinent appellate courts. In fact, the alleged "proliferation" of conflicting cases is a fiction created by lumping together cases that have totally different holdings and circumstances.

The vast majority of recent cases have involved the unique setting (not present here) of a surety that provides a bond to guaranty the obligations that ERISA imposes on an "employer" as that term is defined by ERISA.[5] Indeed, the main authority relied on by Petitioner below, *JWJ Contracting Co. v. Continental Ins. Co.*, 135 F.3d 672 (9th Cir. 1998), was convincingly distinguished by the Washington Supreme Court on this ground

> because the bond foreclosure actions [in JWJ] *were against the delinquent employers themselves* and did not attempt to shift liability to fund an ERISA plan to a third party. There is a significant difference between plaintiffs enforcing their rights against their employer's bond as opposed to applying a state lien law to recover benefit contributions from a third party to the contract rather than enforce rights under a contract.

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[5] ERISA's civil enforcement scheme provides a specific cause of action against an "employer" to collect the delinquent pension contributions where a "fiduciary" such as a trust fund created under a collective bargaining agreement may sue to enforce provisions of a plan governed by ERISA. 29 U.S.C. § 1132(a)(3). ERISA imposes such liability only on "employers" as required by the terms and conditions of multiemployer benefit plans. 29 U.S.C. § 1145. A pension trustee therefore can sue an "employer" to collect contributions due under Section 1145. *Romney v. Lin*, 105 F.3d 806, 810 (2d Cir. 1997). ERISA's civil enforcement mechanism is intended to be the exclusive method of enforcing its substantive provisions. *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 54 (1987); *Massachusetts Mutual Life Ins. Co. v. Russell*, 473 U.S. 134, 146 (1985).

Pet. at 12(a) (emphasis added). In this Court, Petitioner no longer relies on this case – and properly so. In *JWJ Contracting*, the actual ERISA "employer" (JWJ) was sued together with *its surety* who had contractually assumed the ERISA obligation of its principal (the employer). In this setting, there has indeed been considerable litigation in recent years and some courts have held, as did *JWJ Contracting*, that ERISA does not preempt claims against the *employer's* surety. Here, it is uncontroverted that the ERISA "employer" was the subcontractor Trig Electric, not Respondent Lydig Construction.

Such employer surety cases therefore permit claimants to invoke state law collection procedures to collect debts from responsible parties in line with *Mackey v. Lanier Collection Agency & Service, Inc.*, 486 U.S. 825, 834 n.10 (1988), which held that a general Georgia garnishment statute was not preempted because it was "merely a procedural mechanism for enforcing judgments" against responsible parties and "create[d] no substantive causes of action, nor new bases for relief, or any grounds for recovery. . . . " In contrast, the bond statute as invoked here by Petitioner squarely shifts the liability to another outside the ambit of ERISA's "employer" definition.

The other cases cited by Petitioner and its amici to show the existence of a square conflict also fall in line with these distinguishable employer surety cases. *Trustees of the Operating Eng'rs Local 825 v. L.B.S. Constr. Co.*, 148 N.J. 561, 691 A.2d 339 (1997) was against the ERISA *employer* together with *its* surety. The New Jersey Supreme Court held that collecting the employer's liability in that manner did not run afoul the ERISA preemption clause since the contractor in that case was

already responsible for its "employer" liability under ERISA. *Eacott v. Ins. Co. of North America*, 40 Conn. App. 777, 673 A.2d 587 (1996) is irrelevant, both because the opinion is not that of a state court of last resort court and is therefore to be disregarded for purposes of determining whether to exercise certiorari jurisdiction,[6] but also because the Connecticut Court of Appeals relied wholly on a Second Circuit case that again turned exclusively on the liability of an employer's surety, *Greenblatt v. Delta Plumbing and Heating Corp.*, 68 F.3d 561 (2d Cir. 1995). *Carpenters Local 261 Health and Welfare Fund v. National Union Fire Ins. Co.*, 686 A.2d 1373 (Pa. Cmwlth. 1996) again involves only a lower state appellate court and again only involves the responsibilities of the employer's surety. In that case, the Commonwealth Court of Pennsylvania simply found that a surety acting directly on behalf of the ERISA employer may not escape its responsibilities under the bond, following *Ragan v. Tri-County Excavating, Inc.*, 62 F.3d 501 (3d Cir. 1995), where a union had entered into a collective bargaining agreement with a company known as Tri-County. Tri-County was found to be the alter ego of another company known as Mele Construction, and therefore the Third Circuit allowed the union to sue the bond provided by Mele in view of the lack of corporate separation between Mele and Tri-County. *Ragan*

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[6] *See* Supreme Court Rule 10. So too with the intermediate appellate court opinion in *Seaboard Surety Co. v. Indiana State Dist. Council of Laborers and Hod Carriers Health and Welfare Fund*, 645 N.E.2d 1121 (Ind. App. 2d Dist. 1995), a case that in any event also did not involve any transfer of pension liability to a stranger to the payment obligation and therefore falls in line with the employer surety cases summarized above.

thus falls in line with the general cases holding that a surety of the ERISA "employer" cannot avoid its bond obligation on the basis of preemption. There is no allegation or proof of a comparable alter ego status between Respondent and the defaulting subcontractor (Trig Electric) in this case. *See also In re Coyne Elec. Contractors, Inc.*, 244 B.R. 245, 252 (Br. S.D.N.Y. 2000) ("there is no shifting of liability here" where employer Coyne admitted its liability for the lien).

Once these easily distinguishable employer surety cases are removed from the mix, the great majority of cases before and after *Travelers* hold that state bond statutes impermissibly augment the exclusive remedy enacted by Congress and thereby create an alternative enforcement mechanism against a hitherto non-liable party. *Plumbing Industry Bd., Plumbing Local Union No. 1 v. E.W. Howell Co., Inc.*, 126 F.3d 61, 68, 69 (2d Cir. 1997) ("because the state law impermissibly adds to the exclusive list of parties ERISA holds responsible for the employer's benefit obligations, it cannot stand."); *Eklecco v. Iron Workers Locals 40, 361 & 417 Union Sec. Funds*, 170 F.3d 353, 357 (2d Cir. 1999) (same); *Trustees of Detroit Carpenters Health & Welfare Fund v. Unified Carpentry Contractors, Inc.*, Lexis 14453 at 6-7 (E.D. Mich. Sep. 3, 1999); *Carpenters Health & Welfare Trust Fund for California v. Tri-Capital Corp.*, 25 F.3d 849, 853 (9th Cir. 1994); *Trustees of the Elec. Workers Health & Welfare Trust v. Marjo Corp.*, 988 F.2d 865, 867 (9th Cir. 1993); *Sturgis v. Herman Miller, Inc.*, 943 F.2d 1127, 1130 (9th Cir. 1991); *Bricklayers Local 33 Benefit Funds v. America's Marble Source, Inc.*, 950 F.2d 114 (3d Cir. 1991); *Chestnut-Adams Ltd. P'ship v. Bricklayers and*

Masons Trust, 415 Mass. 87, 612 N.E.2d 236 (1993); *Carpenters S. Cal. Admin. Corp. v. El Capitan Dev. Co.*, 53 Cal. 3d 1041, 1051, 811 P.2d 246, 282 Cal. Rptr. 277 (1991); *Edwards v. Bethlehem Steel Corp.*, 554 N.E.2d 833, 837 (Ind. Ct. App. 1990). Weighed against this consistent line of authority, there is no "compelling" need to take review here just because the recently surfaced opinion in *Carpenters Local Union No. 26 v. U.S. Fidelity & Guaranty Co.*, 215 F.3d 136 (1st Cir. 2000) may have taken a different tack. *See* Supreme Court Rule 10. At a minimum, any new and superficial schism should be allowed to percolate.[7]

As a result, the opinion below is in line with the great weight of *pertinent* authority. Petitioner and its amici have misleadingly lumped disparate lines of authority together in their haste to create a square conflict where none exists. The opinion below does not conflict with cases holding that trust funds may sue sureties that furnish bonds to secure the "employer" liability created by ERISA.

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[7] Moreover, *Hawaii Laborers Trust Funds v. Maui Prince Hotel*, 81 Haw. 487, 918 P.2d 1143 (1996), cited by Petitioner to establish a split in authority after *Travelers*, does not even cite this Court's *Travelers* decision and therefore is misleadingly represented to this Court as part of a proliferation where "the courts continue to be in conflict about whether third party lien statutes fall within ERISA's preemptive reach" after *Travelers*. Pet. at 10.

III.

PETITIONER'S POLICY ARGUMENT SHOULD BE ADDRESSED TO CONGRESS

Petitioner reverts to a blatant policy argument that state lien laws should, regardless of what ERISA currently requires, be made available for recovery of unpaid contributions. Pet. at 12-13. Not only does the current system correctly place the burden on trustees to vigilantly enforce their collection remedies provided by ERISA, responsibility for correcting any flaw in the current system would lie exclusively with Congress.

First, while Petitioner plainly wants to engage the sympathies of the Court by asserting that employee benefits are at stake, there is *no* evidence any employees failed to receive benefit credits for hours worked on the project. On the contrary, as Petitioner candidly concedes, the plan awards credit to employees regardless of whether employer contributions are paid. Pet. at 12, n.4. As for alleged underpayments to the trusts, it is beyond doubt they have both the primary *statutory* responsibility and the superior *practical* opportunity to prevent the problem from occurring because of the strong remedies against "employers" conferred by ERISA and the collective bargaining agreement. The claim here is based on alleged underpayments by the subcontractor to the trust beginning in June 1997 and ending in January 1998, and the collective bargaining agreement's self-help mechanisms could easily have been invoked as soon as underpayments began to occur, including specifically the right to increase the amount of the fringe benefit bond provided

by the employer's surety or to require payment of benefit contributions in advance.[8]

Thus, the burdens and incentives for enforcement are where Congress put them under ERISA's detailed scheme – the trusts, having enhanced federal statutory remedies (such as the right to collect liquidated damages, 29 U.S.C. § 1132(g)(2)(C)(ii)), must exercise due diligence to ensure that benefit contributions are paid in a timely manner by the responsible parties. *Central States, Southeast & Southwest Areas Pension Fund v. Central Transp., Inc.*, 472 U.S. 559, 572, 580 (1985) (benefit plan trustee has fiduciary duty to assure full and prompt collection of contributions owed by employer to plan). There is simply no "compelling" policy reason to disturb the existing remedial scheme created by Congress.

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[8] *See* App. at 8-10. Under Section 4.01 of the collective bargaining agreement, the *employer* (Trig Electric) was required to post a fringe benefit bond "to ensure the timely payment of all delinquent contributions, delinquent damages, cost of suit, attorneys' fees payable to all fringe benefit funds, to which Employers are required to contribute under the terms of this Agreement." The remedies open to the union under this section of the collective bargaining agreement were several, including the right to "quadruple" the amount of the fringe benefit bond, the right to "withhold" labor from a particular project until the bond (or the quadrupled bond) is obtained as well as the "authority to increase the amount of the fringe benefit bond" in the event the employer (Trig Electric) fails to make payment of any fringe benefits. As a result, the collective bargaining agreement creates a deliberate and negotiated scheme for collateralizing the employer's obligation to pay fringe benefits to the ERISA funds. A central aspect of this scheme is a payment bond – a bond required to be secured by the employer (Trig Electric) and a surety of its choosing.

Second, even if Petitioner's inequity claim had any merit, any remedy would lie with Congress, not this Court. Pet. at 14. Petitioner raises a red herring argument of the first order by contending that unionized employees who receive wages under ERISA plans funded by employer contributions are barred from recovery under *prevailing wage statutes* for comparable wages and benefits. First of all, *there is not now and never has been a prevailing wage statute issue in this case.* Petitioner elected *not* to sue under the Washington prevailing wage statute, RCW 39.12.010, and expressly disclaimed any prevailing wage claim throughout this litigation, including a concession to such effect at oral argument in the Washington Supreme Court.

In any event, the right of unionized employees to proceed under state prevailing wage statutes is not necessarily foreclosed as at least one amicus direly warns. In fact, an intermediate appellate court in Washington held in 1997 that Washington's prevailing wage statute was not preempted by ERISA[9] and it remains to be decided by Washington's court of last resort whether or not such claims are preempted (and, if not preempted, whether they can be enforced through the lien statutes). For purposes of this case, this much is abundantly clear – no prevailing wage statute claim was asserted or preserved below. This Court need not and should not entertain such a claim at this late stage.

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[9] *Ironworkers District Council v. Woodland Park Zoo Planning and Development*, 87 Wn. App. 676, 942 P.2d 1054 (1997).

Finally, prudential considerations weigh against review in this particular case since the opinion below merely declined to overrule Washington's preexisting interpretation of ERISA preemption as applied to the bond statute, *Puget Sound Electrical Workers Health and Welfare Trust Fund v. Merit Co.*, 123 Wn.2d 565, 870 P.2d 960 (1994) ("*Merit*"). The issue below was not one of first impression but rather whether the Washington Supreme Court should overrule *Merit* in spite of the doctrine of *stare decisis*. Pet. at 4a. The Washington Supreme Court definitively invoked state law *stare decisis* doctrine as "requir[ing] a clear showing that an established ruled is incorrect and harmful before it is abandoned" and held Petitioner "has not met this substantial burden" under state law. Pet. at 13a-14a (emphasis added). "Accordingly we decline IBEW's invitation to overrule *Merit*."

IV.

CONCLUSION

Petitioner's lack of standing obviates the petition. Moreover, Petitioner's ambitious attempt to create a relevant split in authority fails, since the employer surety cases and the cases analogous to this case are apples and oranges. If Congress enacted a scheme that Petitioner considers inequitable (notwithstanding its superior data to diligently collect unpaid contributions), then it is for Congress to enact a new remedy. Respondents respectfully request that this Honorable Court deny the petition.

RESPECTFULLY SUBMITTED, this 22 day of March, 2001.

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APPENDIX A

FIRST AMENDED NOTICE OF CLAIM OF LIEN
Against Bond and Retained Percentage
(RCW 39.08.030; 39.12.050; 60.28.010; 19.28.120)

To: Department of General Administration

And To: Lydig Construction, Inc.

And To: Trig Electric Construction Co., Inc.

And To: Fidelity & Deposit Company of Maryland

Notice is hereby given that the undersigned Local 46 IBEW (Union), the representative of the employees of Trig Electric Construction Co., Inc. (Employer), has claims for $45,142.07 in unpaid employee benefit contributions, $4,286.16 in liquidated damages and $2,330.98 in interest plus costs and attorneys' fees, for the months of December 1997 and January 1998 against the Payment and Performance Bond No. CMB08047662, issued by Fidelity & Deposit Company of Maryland to Lydig Construction, Inc. for work performed on Archives/BCC Building, Bellevue, Washington, Project No. 94-021H by the employees of Trig Electric Construction Co., Inc.

The Employer has not paid required employee benefits or wages, or an equivalent amount, for work performed on the project, and therefore has not paid the prevailing wage required by RCW 39.12.010 et seq.

/s/

Michael H. Korpi, WSBA #12711
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McKENZIE, P.S.
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Tel. No. (206) 224-9900

SUBSCRIBED AND SWORN to before me this 17th day of July, 1998.

/s/
NOTARY PUBLIC in and for the State of Washington, residing at Renton.
My Commission Expires 2/16/00

APPENDIX B

R. JOSEPH WESLEY
JUDGE OF THE SUPERIOR COURT
KING COUNTY COURTHOUSE
SEATTLE, WASHINGTON 98104-2312

April 15, 1999

Melvin R. Kang
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Re: *Ironworkers District Council v. University of Washington* King County Cause No. 98-2-03821-7 SEA

Dear Counsel:

This letter will serve as a brief Memorandum Decision in the above-referenced matter brought before the Court on Defendants' Motion to Dismiss. Enclosed herewith is a copy of the Order entered this day reflecting the decision herein.

Based upon the holding in the case of *Ironworkers District Council v. Board of Regents*, 970 P.2d 351 (1999), the Plaintiff's complaint as it presently stands would have to be dismissed because the Plaintiff alleges its entitlement to pursue this matter as an "interest party." However, Plaintiff now contends that it has standing as assignee of certain individual members. At the hearing on the instant motion, Plaintiff moved orally to amend its complaint to

allege its status pursuant to the assignments. Both counsel agree that the dispositive issue as to whether such an amendment would save the Plaintiff's case depends upon whether the previously filed lien upon which the instant foreclosure is based is sufficient. In other words, if the filed lien is defective as to the individual members on behalf of whom Plaintiff would seek to amend its complaint as assignee, then such an amendment would be futile, and Plaintiff's motion to amend should be denied, and Defendant's Motion to Dismiss should be granted.

The Court concludes that the underlying lien filed herein is substantially defective. It follows from the holding by the Court of Appeals in *Ironworkers* that the Council could not file a lien in its own name as an "interested party." Likewise, from the dicta in *Ironworkers*, it could presumably file a lien as assignee of specific workers. But in any event, at a minimum the lien notice must inform the parties against whom the lien is asserted of the identification of the claiming parties. Although substantial compliance is often sufficient, the failure to identify the lien claimants is not an insubstantial defect. In fact, as filed, the lien misidentifies the claimant. The purported assignments later obtained do not help Plaintiff in this regard. At the time the lien was filed, the party claiming the lien, the Council, had no assignments. It is even questionable whether the lien would have been sufficient as filed had the Council had in hand assignments from individuals, where the lien filing does not put the parties against whom the lien is asserted on notice of the claiming parties.

Based upon the foregoing, Defendant's Motion to Dismiss has been granted.

Thank you both for your excellent presentations.

Sincerely,

/s/

R. JOSEPH WESLEY
Judge

cc: Court File

APPENDIX C

NOTICE OF CLAIM OF LIEN
Against Bond and Retained Percentage
(RCW 39.08.030; 39.12.050; 60.28.010; 19.28.120)

To: Department of General Administration

And To: Lydig Construction, Inc.

And To: Trig Electric Construction Co., Inc.

And To: Fidelity & Deposit Company of Maryland

Notice is hereby given that the undersigned Local 46 IBEW (Union), the representative of the employees of Trig Electric Construction Co., Inc. (Employer), has claims for $45,142.07 in unpaid employee benefit contributions, $4,286.16 in liquidated damages, $788.81 in interest, and $200 in attorneys' fees for the delinquent months of December 1997 and January 1998 against the Payment and Performance Bond No. CMB08047662 issued by Fidelity & Deposit Company of Maryland to Lydig Construction, Inc., for work performed on Archives/BCC Building, Bellevue, Washington, Project No. 94-021H by the employees of Trig Electric Construction Co., Inc.

The Employer has not paid required employee benefits or wages, or an equivalent amount, for work performed on the project, and therefore has not paid the prevailing wage required by RCW 39.12.010 et seq.

/s/

Michael H. Korpi, WSBA #12711
DONALDSON, KIEL &
McKENZIE, P.S.
Attorneys for Claimants
720 Olive Way, Suite 1605
Seattle, WA 98101
Tel. No. (206) 224-9900

SUBSCRIBED AND SWORN to before me this 24th day of March, 1998.

/s/
NOTARY PUBLIC in and for the State of Washington, residing at Renton.

My Commission Expires 2/16/00

APPENDIX D

ARTICLE IV
FRINGE BENEFITS

Section 4.01(a) **FRINGE BENEFIT BOND**. Employers employing from one (1) to ten (10) workers shall be required to post a five thousand dollar ($5,000) fringe benefit bond with the administrative agent of the Local Union No. 46, IBEW Health and Welfare Trust to insure the timely payment of delinquent contributions, liquidated damages, cost of suit, attorney fees payable to all fringe benefit funds, to which Employers are required to contribute by the terms of this Agreement. Employers employing eleven (11) or more workers shall be required to post a ten thousand dollar ($10,000) fringe benefit bond with the same administrative agent and for the same purposes. The Union shall have the responsibility of monitoring the number of workers of an Employer to insure compliance with this provision. NECA and the Union have agreed to develop language to protect the fringe benefits by enacting a mutually agreed upon variable rate fringe benefit bond. IT is further agreed that the language will be made part of the Agreement prior to May 31, 1996.

(b) In the event an employer fails at any time to secure, maintain, renew or otherwise keep in full force and effect a fringe benefit bond in accordance with the provisions of section 4.01(a), the Union and NECA shall immediately provide the employer with a written notice stating that said employer is in violation of this agreement and demanding that the said employer obtain and produce satisfactory evidence documenting the existence of a suitable bond within forty-eight (48) hours. If the

employer fails to remedy the violation within forty-eight (48) hours following receipt of notice from the Union and NECA, said employer shall be deemed in default under section 4.01(a) and the amount of the fringe benefit bond applicable to said employer shall automatically quadruple. An employer in default under section 4.01(a) shall not be permitted to hire, employ or retain apprentices or unindentured and apprentices shall be rotated to other employers as sufficient employment opportunities become available. In addition, the Union may direct or request the workers employed by an employer in default under Section 4.01(a) to withhold their labor until such time as an appropriate fringe benefit bond is obtained. In the event a worker loses any time while in compliance with a union directive or request to withhold labor due to his/her employer's failure to obtain a fringe benefit bond, such lost time shall be regarded as time worked and the employer shall pay the wages, fringe benefits contributions required under the terms of this agreement for the entire period of time during which labor has been withheld. The Union shall have the authority to require payment of such wages, fringe benefits contributions as a condition precedent to the return to work by the affected employees.

(c) In the event an Employer fails to make a timely payment to any of the fringe benefit funds the trustees of such funds shall have the authority to increase the amount of the fringe benefit bond applicable to said Employer under section 4.01(a) and/or to require said Employer to discharge its future total monthly fringe benefit Liability in advance for such time as the Trustees deem appropriate. The monthly fringe benefit amount

payable in advance shall equal the average of the three highest monthly contributions made by said Employer during the twelve (12) month period immediately preceding the most recent delinquency or manpower will be withheld.